Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

INFUSION RESOURCES, INC., AND DIABETES RESOURCES, INC., D/B/A INSULIN INFUSION SPECIALTIES, PETITIONERS

v.

MINIMED, INC., RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a Robinson–Patman Act plaintiff must show not only price discrimination competition with the favored buyer at the same functional level and within the same geographic but also competition for the very same customer and the very same dollar.

PARTIES TO THE PROCEEDING

Petitioners:

Infusion Resources, Inc. and Diabetes Resources, Inc., d/b/a Insulin Infusion Specialties

Respondent:

MiniMed, Inc.

MiniMed was purchased by Medtronic, Inc., in 2001 and is now known as Medtronic MiniMed, a wholly owned subsidiary of Medtronic. On April 15, 2002, the district court entered an Order granting IIS's Motion for Addition of Corporate Defendant after Merger, thereby adding Medtronic MiniMed, Inc., as the named Defendant. See Rec. Doc. 131. Appendix C, 21a.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Statutory Involved 2

Statement 3

Reasons for Granting the Writ 16

Conclusion 20

APPENDIX

Appendix A ..... A. 1

Appendix B ..... A. 19

Appendix C ..... Apx. 20

TABLE OF AUTHORITIES

Cases

Belle Pass Terminal, Inc. v. Jolin, Inc., 618 So. 2d 1076 (La.App. 1 Cir. 1993) 15

Falls City, Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983) 20

Godfrey v. Pulitzer Publishing Co., 276 F.3d 405 (8th Cir. 2001) 6

J. Truett Payne Co. v. Chrysler Credit Corp., 451 U.S. 557 (1981) 16, 17, 19

Jessen v. Dr. Kenneth W. Wimberly, D.D.S., 610 So. 2d 252 (La.App. 3 Cir. 1992) 15

Lycon Inc. v. Juenke, 250 F.3d 285 (5th Cir.), cert. denied, 122 S. Ct. 209, 151 L. Ed.2d 149 (2001) 16

M.C. Mfg. Co. v. Texas Foundries, Inc., 517 F.2d 1059 (5th Cir. 1975) 4

Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990) 16, 17, 20

Statutes

15 U.S.C. §13a ..... passim

La. R.S. §51:1409 ..... passim

Other

Groopman, *Annals of Medicine*, The New Yorker, February 10, 2003 8

James A. Pikl, *The Myth of "Functional Availability" and the Robinson-Patman Act*, 2002 Fed. Cts. L. Rev. 1 [101] (Jan. 2002) http://www.fclr.org/2002fedctslrev1.htm 6, 18

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is reported at 351 F.3d 688. It is reprinted in Appendix A (1a).[1] The opinion of the District Court for the Eastern District of Louisiana is not published, filed under seal, and is included in Appendix C (20a).

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on December 5, 2003. A timely petition for rehearing was denied on January 15, 2004. Appendix B (19a). This petition for writ of *certiorari* is filed within 90 days of the date on which the appellate court denied rehearing. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

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[1] References to "A" are to the Appendix; references to "R.E." are to the Record Excerpts in the Court of Appeals. References to the sealed record are designated S.R.[Doc.No.]. Doc.No. refers to the district court Docket Number.

STATUTES INVOLVED

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

La. R.S. §51:1409(a), of the Louisiana Unfair Trade Practices Act, provides in pertinent part:

> § 1409 Private actions
>
> A. Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by R.S. 51:1405, may bring an ac-

tion individually but not in a representative capacity to recover actual damages....

STATEMENT OF THE CASE

The critically important issue raised by this case is whether a claim of unlawful price discrimination under the Robinson–Patman Act can be maintained by a distributor against a manufacturer where the plaintiff distributor is sold the product by the manufacturer at list price and the manufacturer sells the product to its other distributors with a 20% discount, thereby making the distributor unable to compete. The court of appeals answered the question as follows:

> On January 29, 1999, [petitioner]–IIS purchased a single MiniMed pump at the full list price of $4,995 which was shipped from California to Louisiana. IIS submitted unrebutted evidence that between January 1, 1999 and February 4, 1999 MiniMed sold, across state lines, other distributors the same type of pump for $3,996. IIS also submitted an invoice which showed that one of these distributors was a company named "Secure Care", which the district court assumed was Secure

> Care Medical, an entity named by IIS as a MiniMed distributor in the South.
>
> ...
>
> IIS has established that both Secure Care Medical and National Diabetes Pharmacy compete at the same functional level as IIS, *i.e.*, they are all retail sellers of MiniMed's pumps. Additionally, IIS established, at least in respect to National Diabetes Pharmacy, a MiniMed distributor in Virginia, that it operated in the same geographic market because Virginia was one of IIS's contractual territories. IIS, however, has not submitted evidence that either Secure Care Medical or National Diabetes Pharmacy qualified as "favored purchasers" at the time of the alleged price discrimination, when the Agreement with MiniMed was no longer in effect. *See M.C. Mfg.*, 517 F.2d at 1065. Thus, IIS has not shown actual competition with a favored purchaser at the time of the alleged price discrimination and has failed to meet its burden on this element.

The court of appeals found that the distributors were not "favored distributors" under the RPA because

> "competition is determined by careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing." *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1065 (5th Cir. 1975).[2]

The court of appeals accepted MiniMed's contention that proof of actual competition "[u]nder Fifth Circuit law means proof that IIS was competing with a specific favored purchaser for the exact same sales or dollars." MiniMed Brief 21-22. This same customer/same dollar formulation as presented here is a true outlier in the Robinson–Patman Act jurisprudence and unique to the Fifth Circuit. As observed by one commentator:

> This is a gross departure from the statute. The RPA says nothing about the dealer/plaintiff's customers having to be identical for the Act to apply. Likewise, the *Morton Salt* [*FTC v. Morton Salt Co.*, 334 U.S. 37 (1948)] case (cited here by the Fifth Circuit as the source of this "rule") says nothing about the customers of the discriminated-against dealers. This "same customer" rule is nowhere in any previous RPA case law, nor is it found in the wording or legislative history of

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[2] App., *infra*, 7a.

> the Act or in any commentaries previously published. It appears to be *sui generis* with the Fifth Circuit. More importantly, such a narrow definition of "competition," if valid, makes the § 2(b) "meeting competition" defense economically irrelevant and unnecessary, according to at least one commentator.

James A. Pikl, *The Myth of "Functional Availability" and the Robinson-Patman Act*, 2002 Fed. Cts. L. Rev. 1 [101] (Jan. 2002) http://www.fclr.org/2002fedctslrev1.htm. (citation omitted).[3]

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[3] To be sure, MiniMed also relied on Eighth Circuit precedent, *Godfrey v. Pulitzer Publishing Co.*, 276 F.3d 405 (8th Cir. 2001) as support for its position that IIS must prove that it competed with a particular distributor for the exact same customer dollar. To be sure, the Eighth Circuit examined and applied the competitive nexus requirement of the RPA. To be sure, the Eighth Circuit examined and applied the competitive nexus requirement of the RPA. However, the facts and circumstances of *Godfrey* differ significantly from those of this appeal. *Godfrey* involved the distribution and sale of newspapers by various branch dealers with discrete sales boundaries. The Eighth Circuit found "[e]ven where parties operate in airtight territories, they compete if the end buyers of the product can freely travel between the geographic areas to purchase the commodity in question." *Id.* at 411, citing *Falls City, Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, at 436-38 (1983). The court found no competitive relationship between the branch dealers affected by the alleged price discrimination because even though purchasers could determine where and from whom to buy their paper, the purchasers' decision was not motivated by price, but by convenience. Unlike the case in *God-*

In addition to its importance as a matter of antitrust law, the court of appeals' resolution of the question is of enormous practical consequence since it goes to the very heart of the marketing systems employed by manufacturers in this country. If allowed to stand, the decision below imperils the continued stability of a distributor's relationship with their manufacturer suppliers. The issue presented is thus of exceptional national significance meriting review by this Court.

I. Background

Petitioner Insulin Infusion Specialties (IIS) was a diabetes management company that (1) purchased diabetic supplies from manufacturers and sold them to end-users, including insurers, hospitals, and individual patients and (2) provided patient education about managing diabetes. IIS initiated this business activity in 1994 and distributed insulin infusion pumps and complementary disposables manufactured by Respondent MiniMed and others. App., *infra*, 2a

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frey, IIS had no confined sales territory—it had no constraints on selling MiniMed's products to other consumers throughout the United States in direct competition with other MiniMed distributors—to say nothing of the fact that the health care sector with third party payor issues is price sensitive where consumer convenience without an overarching role.

Respondent MiniMed is the world's largest manufacturer of insulin infusion pumps. MiniMed's United States market share hovers around 80%. MiniMed pumps have a list price of just under $5,000, and a patient may expect to expend over $2,000 per year for the complementary disposable items associated with the pump. *Id.*

A. Insulin Therapy

There are over 840,000 diabetics in the United States. Type 1 diabetes is a chronic autoimmune disease without a known cure that occurs "when T cells attack and destroy the islet cells in the pancreas, which produce insulin. Without the ability to produce insulin, a person cannot properly metabolize glucose, and toxic acids accumulate in the blood. Over time, serious complications may arise, among them blindness, kidney failure, extensive nerve damage, and accelerated atherosclerosis, which can lead to a heart attack or a stroke." Groopman, *Annals of Medicine, The New Yorker*, February 10, 2003, at p. 48.

A Type 1 diabetic must take insulin every day to replace what the pancreas is unable to produce by injecting "insulin using a syringe or an insulin pen injector. ... [or by using] an insulin pump, which pro-

vides a continuous supply of insulin, eliminating the need for daily shots.)."[4]

"Pump therapy" is an alternative therapy to treating diabetes with daily hypodermic syringe insulin injections. An insulin pump, about the size of a deck of cards, is able to provide the user a continuous supply of insulin, thereby eliminating the need for daily shots. Insulin pumps are touted as providing better blood sugar management than separate hypodermic insulin injections. A pump wearer gains lifestyle advantages such as the ability to enjoy physical activity by better insulin delivery control. To benefit from pump therapy, the diabetic must be willing to learn to monitor blood sugar levels regularly in close consultation with his physician and medical educator.

II. Statement of Facts

Since 1994, IIS sold MiniMed pumps and provided concomitant diabetes education to end users. In early 1997, MiniMed contacted IIS to enter into a more formal business Agreement; and if IIS chose not to accept the Agreement its discounts on MiniMed pumps would be reduced. On July 17, 1997, IIS and MiniMed signed an Educational Dealer Distribution Agreement and Letter Agreement (collectively

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[4] Mayo Clinic website, Diabetes, at www.mayoclinic.com ("Mayo").

"Agreement"). The Agreement was renewable. Under the Agreement, IIS continued to receive MiniMed products at a 29% discount. *Id.* The Agreement was renewed for 1998, and during this time IIS invested in growing its business by championing MiniMed's pumps. By year-end 1998, IIS was one of MiniMed's largest volume independent dealer with ever increasing sales of MiniMed pumps.

IIS's territory under the Agreement included the Southern states of Louisiana, Texas, Arkansas, Virginia, North Carolina and Mississippi. *Id.* Moreover, IIS had contracts with third-party payors that could require sales activity outside of the territory set forth in the Agreement. (R. 987). IIS had patients in 48 states. S.R.Doc.No.112, Sworn Statement of Material Facts, p. 2, ¶6. Nevertheless on November 23, 1998, MiniMed sent IIS written notice it was terminating the Agreement, which would have otherwise automatically renewed the following week for calendar year 1999. In the non-renewal letter, MiniMed stated "it hoped to retain IIS as a valued customer" and then pointedly reduced IIS's 29% discount on MiniMed pumps to a 0% discount.

This elimination of discount meant that from January 1, 1999 forward, IIS would have to pay MiniMed the full list price for pumps, i.e. IIS had to pay MiniMed the same suggested retail price that MiniMed charged to end users, while MiniMed's

other distributors with whom IIS was in direct competition enjoyed twenty percent (20%) discounts. On January 1, 1999, IIS also became a nationwide distributor, albeit without a written Agreement, and therefore competed with MiniMed's other distributors in the 48 states in which IIS had existing customers. (S.R.Doc.No.112, Sworn Statement of Material Facts, p. 6, ¶31—IIS was still strong in mid 1999 and continued to receive orders from its customers for MiniMed products.)[5]

On January 29, 1999, MiniMed sold an insulin pump to IIS at a unit price of $4,995, the undiscounted manufacturer's list price, while MiniMed's other distributors were favored with a $3,996 price. Moreover, the record evidence shows MiniMed had a surreptitious strategy to destroy IIS premeditated months before it terminated the Agreement.[6]

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[5] In 1998, the last year in which MiniMed favored it with a discount, ISS sold 1,187 MiniMed pumps. In 1999 IIS sold 577 MiniMed pumps. In 2000 IIS sold two pumps and in 2001, IIS did not sell a single MiniMed pump.

[6] The record shows throughout the duration of the Agreement while IIS successfully used its best efforts to sell MiniMed's products, while MiniMed contemporaneously intended to terminate and destroy IIS. For example, the Agreement was in force, MiniMed's internal documents are peppered with references such as "D-Day appears to be upon us shortly....pull the trigger; ...Our strategy ... offer their [IIS] key sales people [positions leaving] disabled Sales Force. ... We have managed to decrease the number of pumps through IIS by 25% over the

III. Proceedings in the District Court

A. Commencement of the Action

In February 1999, IIS filed a petition for damages and declaratory relief in Louisiana State Court. On March 8, 1999, MiniMed removed to federal court based on diversity jurisdiction.

B. The Pertinent Claims

IIS alleged violations of the Louisiana Unfair Trade Practices (LUTPA– La. R.S. 51:1401 *et seq.*, based on, among other things, unlawful price discrimination prohibited by the federal Robinson–Patman Act (15 U.S.C. §13(a)) (RPA).

C. District Court Issues a Series of Rulings

The district court issued numerous rulings, which dismissed all of IIS's claims. IIS lists and describes only those rulings and orders that directly bear on the court of appeals proceedings and this petition for certiorari, namely the granting of summary judgment to MiniMed on IIS's Robinson–Patman Act claim.

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past few months. ... IIS has the Blue Cross contract. We [MiniMed] had to use them. I always try to use any other dealer instead of IIS. I believe their discount is too high. ... [and hinders our efforts] to protect the pricing within the insurance industry.... put IIS on a leash ... weaken or destroy them".

1. Summary Judgment on IIS's Price Discrimination Claims

On May 2, 2002, the district court granted MiniMed's Motion for Partial Summary Judgment on IIS's price discrimination claims under the RPA and La. R.S. § 51:331. Appendix C, 20a. In its summary judgment ruling, the court found that IIS satisfied RPA's requirements of (1) the interstate sales of goods and (2) the sale of goods of a like grade and quality. The district court granted summary judgment to MiniMed on the RPA claim because it found that IIS made no showing that favored and disfavored purchasers competed within the same geographic market.

On September 27, 2002, the district court entered Judgment, dismissing all of IIS's claims and granting judgment in favor of MiniMed against IIS in the amount of $1,004,007.

D. The Court of Appeals' Decision

The court of appeals affirmed. The court of appeals sets forth the four elements necessary for a secondary-line violation of the RPA: "one, sales made in interstate commerce; two, the commodities sold to IIS were of the same grade and quality as those sold to other MiniMed distributors; three, MiniMed discriminated in price between IIS and other distribu-

tors; and four, that the discrimination had a prohibited effect on competition."

The court of appeals found elements one and two were met. The court of appeals further found that two MiniMed distributors, NDP and Secure Care, competed with IIS, the court nevertheless concluded that element three was lacking, *i.e.*, IIS did not show that NDP and Secure Care were "favored." The record, however, shows the court of appeals is wrong.

During the relevant period after January 1, 1999, IIS remained a MiniMed distributor free to sell MiniMed products throughout the United States. During the relevant period after January 1, 1999, National Diabetic Pharmacy and Secure Care received a substantial discount on all pump purchases, paying only $3,996.00 and $3,846.15 per pump respectively. In contrast, IIS's price was $4,995.00 per pump. A. Thus, both NDP and Secure Care, which the Court found did sell pumps in the same geographic area as IIS, and therefore were competitors of IIS, were in fact "favored" purchasers. IIS, which paid substantially more for the identical product, can only be determined to be a "disfavored" purchaser. See court of appeals' decision at 4a.

1. IIS's petition for rehearing

IIS timely moved for rehearing on the ground that the very reasoning of the court of appeals compelled

a finding that IIS had marshaled sufficient evidence to withstand summary judgment as to its state unfair trade practices claim. The court of appeals recognized that MiniMed's conduct was of the type and kind the Federal Trade Commission could enjoin. App., infra, 16a. That is to say, even if MiniMed's conduct does not give rise to a treble damage suit to a private litigant under federal antitrust laws, IIS has stated a state unfair trade practices act claim, predicated on the RPA. The Louisiana Unfair Trade Practices Act Claim ("LUTPA").[7]

IIS reurged that LUTPA is designed to give a state remedy for unlawful and unethical business behavior;[8] IIS has shown a prima facie RPA violation enjoinable by the FTC, which is sufficient to support a Louisiana unfair trade practice claim entitling IIS to have a merits trial on the LUTPA claims. The court of appeals denied rehearing. App., infra, 19a.

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[7] La. R.S. §51:1409(a).

[8] Louisiana courts have defined "unfair conduct" as conduct being offensive to public policy or immoral, unethical, oppressive, unscrupulous or substantially injurious. Determinations as to whether a defendant's conduct falls within this definition should be made on a case-by-case basis. *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 618 So. 2d 1076, 1081 (La.App. 1 Cir. 1993); *Jessen v. Dr. Kenneth W. Wimberly, D.D.S.*, 610 So. 2d 252, 257 (La.App. 3 Cir. 1992).

REASONS FOR GRANTING THE WRIT

Secondary-line injury under the Robinson–Patman Act results from price discrimination between favored and disfavored buyers. *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 558 n. 15, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (1990). The elements of a prima facie secondary-line violation under the Robinson–Patman Act are as follows:

one, sales made in interstate commerce;

two, the commodities sold to IIS were of the same grade and quality as those sold to other MiniMed distributors;

three, MiniMed discriminated in price between IIS and other distributors; and

four, that the discrimination had a prohibited effect on competition.

Lycon Inc. v. Juenke, 250 F.3d 285, 288 (5th Cir.), cert. denied, 122 S. Ct. 209, 151 L. Ed.2d 149 (2001).

The court of appeals found that IIS met elements one and two. The court of appeals found at the time the price differential was imposed, i.e., after December 31, 1998, the favored distributors and IIS competed (1) at the same functional level and (2) within

the same geographic market. App., infra, 9a. The court of appeals nevertheless found that to prevail under the RPA a plaintiff must also show that the price discrimination only mattered if IIS was competing for the same sale and the same dollar as the favored distributor. App., infra, 7a.

The RPA says nothing about the distributor's customers having to be identical for the Act to apply. This Court has repeatedly held that § 2(a) is violated merely upon a showing that the price discrimination may substantially lessen competition; the statute does not require that the discrimination must in fact have harmed competition. *See, e.g., J. Truett Payne Co. v. Chrysler Credit Corp.*, 451 U.S. 557, 561-62 (1981). "[A]n injury to competition may be inferred from evidence that some purchasers had to pay their suppliers substantially more for their goods than their competitors had to pay." *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 559 (1990)(quoting *FTC v. Morton Salt*, 334 U.S. 37, 46-47 (1948). "A price discrimination within the meaning of § 2(a) is merely a price difference." *Id.* In the instant case, it is undisputed that MiniMed charged IIS full market price starting on January 1, 1999, while other MiniMed distributors continued to receive MiniMed pumps at a substantial 20% discount. App., 4a.

To benefit from the competitive injury inference, IIS only had to show that IIS and other MiniMed

distributors competed, which is the case. To add the same dollar and same customer gloss is without warrant and apparently *sui generis* to the fifth circuit. See James A. Pikl, *The Myth of "Functional Availability" and the Robinson-Patman Act*, 2002 Fed. Cts. L. Rev. 1 [101]; [118] (Jan. 2002) http://www.fclr.org/2002fedctslrev1.htm.

2. The decision of the court of appeals also merits review by this Court because it reached element four of a Robinson–Patman Act secondary–line claim that conflicts with this Court's pronouncements. In *J. Truett Payne Co. v. Chrysler Credit Corp.*, 451 U.S. 557, 561-62 (1981), this Court explained that

> [Damage] issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may conclude as a matter of just and reasonable inference from the proof of defendants wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices profits and values not shown to be attributable to other causes, that defendants' wrongful acts had

caused damage to the plaintiffs. (citations omitted.)

The record establishes MiniMed's wrongful and illegal price discrimination a three-year period from January 1, 1999 until IIS was forced to liquidate. To say nothing that it is intuitively obvious that a retailer cannot compete with other retail distributors when it buys at list price and its competitors receive a substantial 20% discount. This Court has often stated that "for the purposes of Section 2(a), injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time." *Falls City, Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983); see also *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 559 (1990). However, this is not the case in the fifth circuit. The Court is invited to restate clearly *Hasbrouck's* reach.

CONCLUSION

For the foregoing reasons, we respectfully request that a writ of *certiorari* be granted.

Respectfully submitted.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 02-31084

Infusion Resources, Inc., and
Diabetes Resources, Inc.,
d/b/a Insulin Infusion Specialties,
Plaintiffs–Appellants,

versus

MiniMed, Inc.,
Defendant–Appellee.

On Appeal from the United States District
Court for the Eastern District of Louisiana

[December 5, 2003, Filed]

Before HIGGINBOTHAM, STEWART, and PRADO
Circuit Judges.

CARL E. STEWART, Circuit Judge:

Appellants Infusion Resources, Inc. and Diabetes Resources, Inc., d/b/a Insulin Infusion Specialties ("IIS") appeal the decision of the district court granting Appellee Minimed, Inc.'s ("Minimed") motion for summary judgment dismissing IIS's following causes of action: price discrimination

claims under the Robinson-Patman Act ("RPA"), 15 U.S.C. § 13(a)/ § 2(a) Clayton Act, and the Louisiana Price Discrimination Act ("LPDA"), La. R.S. § 51:331; a claim for lack of fair dealing under the Louisiana Unfair Trade Practices Act ("LUTPA"), La. § 51:1409; and claims for breach of the implied duty of good faith, breach of contract, defamation and violation of trade secrets. IIS also appeals the district court's denial of its Fed. R. Civ. P. 59(e) motion for reconsideration. For the reasons that follow, we affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Minimed is the world's largest manufacturer of insulin infusion pumps. MiniMed's United States pump therapy market share is approximately 80%. According to MiniMed, between the years 1996 to 2001, users of insulin pumps increased from about 6,000 to about 54,000 nationwide. MiniMed pumps have a list price of $ 4,995, and a patient may expect to expend over $ 2,000 per year for the complementary disposable items associated with the pump.

IIS conducted business as an insulin pump distributor and related supplies to end-users for at least two of MiniMed's competitors. In the Fall of 1994, IIS informally became a distributor of MiniMed's pumps. In July 1997, the two parties entered into a formal written Distribution Agreement (the "Agreement"), which provided that California law would govern, granting IIS a non-exclusive right to sell and distribute MiniMed products. The Agreement also bestowed upon IIS the ability to purchase the pumps from MiniMed at

the highest available discount, up to 29%, depending on IIS's overall purchase volumes. Additionally, IIS agreed to promote MiniMed and its products and maintain adequate facilities and personnel to do so, as well as provide training to pump purchasers and pay all costs to deliver products to end users. IIS also agreed, with one exception[1] n1, to market MiniMed's products exclusively and that it would not directly or indirectly manufacture, distribute or market products which compete directly or indirectly with products manufactured by MiniMed. The Agreement did not grant IIS an exclusive distributorship and MiniMed was expressly allowed both to sell its products in the territories served by IIS, and to utilize other distributors. The Agreement contained an annual renewal clause, which allowed either party to decline renewal of the Agreement, with or without cause, on thirty days written notice prior to the end of the current calendar year.[2]

The parties operated under the Agreement from July 17, 1997 until December 31, 1998 during which

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[1] This exception provided:

> To the extent customers of IIS requested infusion sets not manufactured or distributed by Minimed, IIS may carry such infusion sets to fill orders expressly requested by customers; provided however, that all such infusion sets other than those manufactured by or for MiniMed which are distributed by IIS shall not exceed an aggregate of 20% of all such sets (determined by retail sale price) distributed by IIS in any calendar [sic] year.

[2] IIS's contractual distribution territory per the Agreement included Louisiana, Texas, Arkansas, Ohio, Pennsylvania, New York, Connecticut, New Jersey, Utah, Virginia, North Carolina and Mississippi.

time IIS received a 29% discount off of the list price on MiniMed pumps. On November 23, 1998, MiniMed sent IIS written notice that it was not going to renew the Agreement for the 1999 calender [sic] year, and the Agreement terminated on December 31, 1998. MiniMed indicated to IIS that it was willing to continue selling pumps to IIS at the full list price. On January 29, 1999, IIS purchased a single MiniMed pump at the full list price of $ 4,995 which was shipped from California to Louisiana. IIS submitted unrebutted evidence that between January 1, 1999 and February 4, 1999 MiniMed sold, across state lines, other distributors the same type of pump for $ 3,996. IIS also submitted an invoice which showed that one of these distributors was a company named "Secure Care", which the district court assumed was Secure Care Medical, an entity named by IIS as a MiniMed distributor in the South.

IIS initiated an action in November, 1998, in which it claimed that MiniMed breached the Agreement by both wrongfully passing IIS confidential and proprietary information to MiniMed salespersons and by making intentional and material misrepresentations to IIS's customers in order to divert sales from IIS to MiniMed. IIS also complained that MiniMed acquired IIS's two main distribution competitors and unfairly manipulated the wholesale prices at which it sold its products to IIS, in order to hinder IIS's ability to compete with MiniMed or MiniMed-owned

distributors.[3] IIS sought damages pursuant to MiniMed's alleged price discrimination, unfair trade practices, breach of contract and implied obligation of good faith, trade secrets violations, defamation, and detrimental reliance. On March 8, 1999, MiniMed timely removed the case and filed a cross motion for summary judgment to dismiss all of IIS's claims, which the district court granted.

IIS now appeals and argues that the district court erred in: (1) dismissing IIS's price discrimination claims by finding that there were no disputed facts regarding whether IIS engaged in actual competition with any favored resellers of MiniMed; (2) dismissing IIS's LUTPA claim; (3) excluding IIS's expert evidence regarding the damages it suffered as a result of MiniMed's conduct; (4) dismissing IIS's breach of contract and implied duty of good faith, defamation and fair dealing claims; (5) denying IIS's 59(e) motion for reconsideration of its order granting MiniMed summary judgment dismissing of all of IIS's claims; and (6) dismissing IIS's price discrimination claims by finding that IIS failed to present evidence of actual injury.

DISCUSSION

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[3] IIS submitted MiniMed's 1999 10-K report filed with Securities and Exchange Commission which stated that in 1998 MiniMed had acquired two distributors named HMS and DSS. In the report MiniMed allegedly stated "By increasing our ability to satisfy more of our customers' needs and continuing our extensive customer service efforts, we believe we can maximize our revenues over the long term and create barriers to entry for competitors." IIS, however, did not offer any evidence as to what specific geographic areas these two distributors operated in.

I. Standard of Review

This Court reviews a district court's grant of summary judgment *de novo*. Am. States Ins. Co. v. Synod of the Russian Orthodox Church Outside of Russia, 335 F.3d 493 (5th Cir. 2003). Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c)); Tango Transp. v. Healthcare Fin. Servs. LLC, 322 F.3d 888, 890 (5th Cir. 2003). A genuine issue of material fact exists if the record, taken as a whole, could lead a rational trier of fact to find for the non-moving party. Id. Questions of law are reviewed de novo. Id.

II. Price Discrimination Robinson-Patman Act, 15 U.S.C. § 13(a)/ § 2(a) Clayton Act[4]

In order to recover damages for a claim under § 13(a) of the Robinson-Patman Act (RPA)/ § 2(a) Clayton Act claim, a plaintiff must prove four facts: one, sales made in interstate commerce; two, the commodities sold to IIS were of the same grade and quality as those sold to other purchasers; three, MiniMed discriminated in price between IIS and other purchasers; and four, that the discrimination had a prohibited effect on competition. Lycon Inc. v. Juenke, 250 F.3d 285, 288 (5th Cir.), cert. denied, 122 S. Ct. 209 (2001). RPA § 13(a) includes two basic types of injury, primary line and secondary line.

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[4]

Eximco, Inc. v. Trane Co., 737 F.2d 505, 515 (5th Cir.), reh'g granted in part, amended in part on other grounds, 748 F.2d 287 (5th Cir. 1984). Secondary-line injury, which IIS claims to have incurred, results from price discrimination between favored and disfavored buyers. Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 558 n. 15, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (1990).

The district court held that while IIS met its burden on elements one and two, it failed to show element three, that MiniMed discriminated in price between IIS and other purchasers, and dismissed IIS's claim at that point. The district court did not reach element four.

Under element three a plaintiff "must first prove that as the disfavored purchaser, it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential" and that this "competitive nexus requirement is satisfied when there is a showing of 'competitive contact' between the recipients of the price differential." Best Brands Beverage, Inc. v. Falstaff Brewing Co., 842 F.2d 578, 584 (2d Cir. 1987). In other words it "must therefore be shown that as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market." Id. at 585. This Court has explained that "competition is determined by careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing." M.C. Mfg. Co. v. Texas Foundries, Inc., 517 F.2d 1059, 1065 (5th Cir. 1975).

In concluding that IIS failed to satisfy element three, the district court noted that IIS's claim that it was one of MiniMed's top three distributors in the United States and that it was competing nationwide with MiniMed's other distributors, even if true, does not necessarily indicate that the markets of these distributors overlapped. The district court found that IIS did not specifically demonstrate any evidence showing that it directly competed with any of MiniMed's other distributors for "the same dollar" nationwide. The district court noted that while IIS did proffer some evidence that prior to the alleged price discrimination it competed with at least one reseller, Secure Care Medical, in the South, and that an entity named National Diabetes Pharmacy distributed MiniMed products in Virginia, it had not specifically pointed to any evidence that at the time of the alleged price discrimination that it was competing with these entities or any other entity in a particular market.

IIS asserts that the evidence it presented - that before and after January 1, 1999, it competed with other MiniMed distributors for customers - was sufficient to meet its "competitive nexus burden" and preclude the district court's granting of MiniMed's motion to dismiss for IIS's failure to meet element three of its § 13(a) RPA claim. IIS also asserts that the district court acknowledged that it submitted evidence that IIS competed with at least one other reseller, Secure Care Medical, in the South. Furthermore, IIS submitted evidence that another entity, National Diabetes Pharmacy, distributed MiniMed pumps IIS's territory of Virginia.

After reviewing the facts on the record and their application to the law, we hold that the district court was correct in its conclusion in regards to element three. The competitive nexus is established if the disfavored purchaser and favored purchaser compete at the same functional level and within the same geographic market at the time of the price discrimination. Best Brands, 842 F.2d at 585. IIS has established that both Secure Care Medical and National Diabetes Pharmacy compete at the same functional level as IIS, i.e., they are all retail sellers of MiniMed's pumps. Additionally, IIS established, at least in respect to National Diabetes Pharmacy, a MiniMed distributor in Virginia, that it operated in the same geographic market because Virginia was one of IIS's contractual territories. IIS, however, has not submitted evidence that either Secure Care Medical or National Diabetes Pharmacy qualified as "favored purchasers" at the time of the alleged price discrimination, when the Agreement with MiniMed was no longer in effect. See M.C. Mfg., 517 F.2d at 1065. Thus, IIS has not shown actual competition with a favored purchaser at the time of the alleged price discrimination and has failed to meet its burden on this element.

III. Price Discrimination, Louisiana Price Discrimination Act, La. R.S. § 51:331

The district court also dismissed IIS's price discrimination claim under the LPDS, La. R.S. § 51:331 for the same reasons it dismissed the RPA claim, because IIS failed to show actual competition with a favored purchaser at the time of the alleged

price discrimination, and thus failed to meet its burden. The district court also noted that the language of the statute clearly indicated that the Louisiana legislature intended to address discriminatory pricing "in the state" and IIS failed to show any favored distributors it competed with in Louisiana.

IIS's federalism argument in which it contends that even if its federal RPA claim is dismissed it is still entitled to a state claim under the LPDS, La. R.S. § 51:331 is incorrect. IIS bases this argument on its assertion that the district court dismissed IIS's claim under LPDS simply because it found that IIS's federal antitrust claim under the RPA failed.

This is not a correct understanding of the district court's reasoning for dismissing IIS's LPDS claim. The district court clearly stated that it analyzed IIS's claim under LPDS, and whether IIS established the elements for such claim. The district court found that the Louisiana legislature intended the statute to address discriminatory pricing "in the state" and IIS failed to set forth specific evidence that MiniMed had charged IIS a different price than it charged any other pump distributor in Louisiana, at the time of the alleged price discrimination. Therefore, the district court held that IIS's claim failed. Our review of the record finds no evidence of IIS competing with any other pump distributor in Louisiana at the time of the alleged price discrimination, and therefore the district court was correct in dismissing IIS price discrimination claim under the LPDS.

IV. Louisiana Unfair Trade Practices Act, La. § 51:1409

The district court found that because MiniMed validly effectuated the non-renewal of the Agreement pursuant to the non-renewal clause, evidence submitted by IIS relating to damages from non-renewal of the Agreement would be excluded. The district court also held that MiniMed was not liable for damages under the LUTPA, La. R.S. § 51:1409, which precludes entitlement to damages for non-renewal of an agreement as well as price discounts, and therefore any such evidence presented by IIS for damages under the LUTPA was irrelevant and must be excluded. Turner v. Purina Mills, Inc., 989 F.2d 1419, 1423-24 (5th Cir. 1993). The district court therefore dismissed IIS's LUTPA claim.

IIS argues that it submitted sufficient evidence in the form of MiniMed memoranda showing that MiniMed violated the LUTPA. These memoranda allegedly contain statements made by MiniMed showing it intended to do harm to IIS in violation of the LUTPA.[5] The district court held that Turner precluded damages pursuant to a LUTPA claim when the damages were tied to either a non-renewal of an agreement or price discounts, as was the case here. See 989 F.2d at 1423-24.[6] IIS argues that its

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[5] IIS points to the record to show that MiniMed made the following statements in memoranda such as: "pull trigger"; "put IIS on a leash"; and "weaken or destroy them".

[6] In Turner, 989 F.2d at 1420, the plaintiff was a Purina dealer whose agreement was terminated by Purina pursuant to a non-renewal provision after his sales fell. The dealer then

case is distinguishable from Turner and is more analogous with Chemical Distribs., Inc. v. Exxon Corp., 1 F.3d 1478 (5th Cir. 1993), and notes that this Court distinguished Purina because unlike the claimant in that case, in Exxon, the jury found that Exxon had breached its contract in bad faith, there was sufficient evidence of fraud, misrepresentation, or deception, and there were internal memoranda prepared before the contracts was terminated. Id. at 1485-86.

This Court in Exxon, however, stated that Exxon differed from Turner in that the latter dealt with a suit between a dealer and a supplier, and part of the decision in that case rested on its analysis of the relationship between the two. Id. at 1485. Exxon, in contrast, dealt with a supplier (the plaintiff) - customer (Exxon) relationship and outlined conduct allegedly perpetrated by Exxon that IIS does not allege of MiniMed in this case. Id. Such conduct by Exxon included: conspiring with the plaintiff's supplier to eliminate the plaintiff, refusing in bad faith to pay plaintiff's invoices, and unlawfully seizing the plaintiff's equipment. Id. This Court in Exxon did not indicate that any part of Turner had

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brought suit under the LUTPA and introduced into evidence an internal Purina memoranda which stated that Purina planned to eliminate his business as a major competitor in the relevant markets. Id. at 1420-21. This Court held that Purina did not violate the LUTPA since its termination of the contract was valid, and "an intent to eliminate the competition does not by itself violate LUTPA. Rather, the statute forbids businesses to destroy each other through improper means." Id. at 1423. Finally, this Court held that the LUTPA does not provide an alternative remedy for simple breaches of contract. Id. at 1422.

been invalidated. Because IIS's case significantly resembles Turner more than it does Exxon, the district court's holding that there were no actionable LUTPA claims was correct.

V. IIS's damage report and remaining non-antitrust claims

Once the district court found that IIS had failed to establish the required elements for any of its antitrust claims, and dismissed those claims, it held that the February 5, 2002 damage report submitted by IIS became defective as support for its remaining non-antitrust claims because the report failed to segregate between Minimed's allegedly wrongful antitrust and non-antitrust conduct, and the specific damages that flowed from each.[7] The district court then granted IIS leave to file an amended damage report which listed only those damages caused by the non-antitrust conduct. IIS submitted an amended damage report dated May 19, 2002. The district court reviewed the amended report and granted Minimed's motion to strike the report because it held that IIS simply repackaged its original report, which claimed its damages flowed from Minimed's antitrust conduct, to assert that essentially the same damages now flowed from the remaining non-antitrust claims.[8] Upon striking the

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[7] These remaining claims were (1) detrimental reliance, (2) breach of contract and the implied obligation of good faith and fair dealing under California law, (3) defamation under Louisiana law, and (4) unfair trade practices.

[8] IIS's February 5, 2002 expert damage report used a projection of future earnings model to calculate its damages resulting from the change in commercial relationship between

amended damage report the district court also granted Minimed's summary judgment motion to dismiss IIS's remaining non-antitrust claims.

The district court was correct to strike the amended report because it did not properly reflect the true amount of estimated damages which flowed from the remaining non-antitrust claims, making the report seriously flawed and inadmissible. City of Vernon v. S. Cal. Edison Co., 955 F.2d 1361, 1371-73 (9th Cir.), cert. denied, 506 U.S. 908, 121 L. Ed. 2d 228 (1992) (affirming summary judgment for defendant because of, inter alia, plaintiff's failure to properly prove damages where plaintiff did not attempt to or offer to correct the only possibly admissible damages study).

Furthermore, IIS's argument that the disaggregation rule is only required in antitrust cases, and thus became non-applicable once its antitrust claims were dismissed, is incorrect.[9] This

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MiniMed and IIS. When IIS subsequently submitted its May 19, 2002 amended damage report, it again used the projection of future earnings model, but then attributed the same damages to its remaining non-antitrust claims.

[9] To support this argument IIS cites Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1243 (7th Cir. 1982), aff'd, 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 434 (N.D. Cal. 1978), aff'd sub nom. Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir. 1980), cert. denied, 452 U.S. 972, 69 L. Ed. 2d 983 (1981). However, while these cases do hold that disaggregation generally applies to antitrust claims, none of them held that disaggregation is only required in antitrust cases. Furthermore, Minimed cites to non-antitrust cases held that disaggregation of damages does apply to other than antitrust claims. Fleet Nat'l Bank v. Anchor Media Television,

Court has not limited the concept of disaggregation merely to antitrust actions. See, e.g. Perrone v. GMAC, 232 F.3d 433 (5th Cir. 2000) (actual damages for violation of the Truth in Lending Act requires direct causal relationship between the amount of damages and injury or harm); National Papaya Co. v. Domain Industries, Inc., 592 F.2d 813, 818 (5th Cir. 1979) (in a breach of warranty claim the plaintiff has the burden to show that it's lost profit damages flowed as the natural and proximate result of the defendant's wrongful conduct).

Because IIS merely repackaged its original damages report, and submitted it as an amended report to support its remaining non-antitrust claims, the district court was correct to exclude it. Once the amended damages report was excluded, IIS could not show any damages resulting from its remaining non-antitrust claims. Therefore, the district court was correct in dismissing these remaining claims because IIS had failed to submit proper proof of damages.

VI. Treble damages under § 4 of the Clayton Act

The district court concluded that because IIS had failed to carry its burden against MiniMed's summary judgment motion under element three, it need not address alternative arguments for

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Inc., 45 F.3d 546, 560 (1st Cir. 1995) ("The law ... requires that a party prove, as an element of its case, the extent to which it was damaged by the fraud or breach"); Doe v. United States, 976 F.2d 1071, 1085-1086 (7th Cir. 1993)("the trial court did not abuse its discretion in finding that a causal relationship was insufficiently established").

dismissal. MiniMed argued alternatively that IIS failed to show element four of its § 13(a) RPA claim, that the alleged discrimination prohibitively effected competition, by causing harm to IIS, or that IIS had suffered actual injury under § 2(a) of the Clayton Act for the purpose of establishing entitlement to treble damages pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15.

IIS's argues that all that is necessary to show harm under § 2(a) of the Clayton Act for the purpose of establishing entitlement to treble damages pursuant to § 4 of the Clayton Act is the presence of price discrimination. This is incorrect. The Supreme Court in J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 561, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981) stated that a showing of price discrimination is sufficient when seeking an injunction under § 2(a), but not when damages are sought. Because IIS has failed to show actual injury, it failed to satisfy element four of its § 13(a) RPA claim, as well as failing to show that it is entitled to treble damages under § 4 of the Clayton Act.

VII. 59(e) Motion to Reconsider

This Court has held that a 59(e) motion to reconsider should not be granted unless: (1) the facts discovered are of such a nature that they would probably change the outcome; (2) the facts alleged are actually newly discovered and could not have been discovered earlier by proper diligence; and (3) the facts are not merely cumulative or impeaching. See English v. Mattson, 214 F.2d 406, 409 (5th Cir. 1954). The district court held that IIS failed to meet these requirements.

IIS argues that its 59(e) motion for reconsideration of the district court's decision to grant MinMed summary judgment should not have been denied because it satisfied the requirements for reconsideration. Specifically, IIS asserts that it submitted new evidence not available to it at the time the district court granted summary judgment. The alleged new evidence concerns the names of other MiniMed distributors who sold MiniMed pumps throughout the United States and specifically in certain markets that IIS asserted that it was also competing in. IIS argues that this information was not available to it in a timely manner through no fault of its own but through MiniMed's refusal to provide such information during discovery until after its summary judgment motions were granted. IIS argues that this new evidence would have satisfied element three of its § 13(a) RPA claim.

While the new evidence submitted by IIS may not have been discoverable prior to the district courts granting of MiniMed's summary judgment motions, the district court found that it would not have changed the outcome. The district court reasoned that it did not base its summary judgment decision on IIS's failure to show that other distributors competed in certain markets at the time of the alleged price discrimination. Rather, the district court based its decision on IIS's failure to submit sufficient evidence that it also competed in those particular markets during the relevant period, when its agreement with MiniMed to service particular markets had been terminated as of December 31, 1998. Because we have found that IIS failed to

submit proof of competition with a favored purchaser during the time of the alleged price discrimination, the district court's denial of IIS's 59(e) motion for reconsideration was correct.

CONCLUSION

Because IIS failed to submit proof that it competed with favored purchasers in its geographical area at the time of the alleged price discrimination committed by Minimed, failed to submit proper proof of damages, and failed to submit evidence sufficient for a reconsideration of the district court's grant of summary judgment dismissing all of IIS's claims, we affirm the decision of the district court granting Minimed's motion for summary judgment which dismissed all of IIS's claims.

AFFIRM.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 02-31084

Infusion Resources, Inc., and
Diabetes Resources, Inc.,
Doing business as Insulin Infusion Specialties,

Plaintiffs–Appellants,

versus

MiniMed, Inc.,

Defendant–Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

[January 15, 2004, Filed]

Before HIGGINBOTHAM, STEWART, and PRADO Circuit Judges.

IT IS ORDERED that the petition for rehearing is DENIED,

Entered for the Court:

/s/ Carl. E Stewart
United States Circuit Judge

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INFUSION RESOURCES, INC. and DIABETES RESOURCES, INC. d/b/a INSULIN INFUSION SPECIALTIES	CIVIL ACTION
versus	NO. 99-0771
MiniMed, Inc.	SECTION "C" (1)

[SEALED]
[DATE OF ENTRY: MAY 3, 2002]
[DOCKET NO. 142]

ORDER AND REASONS

Before the Court are the parties' cross motions for partial summary judgment on claims by Plaintiffs, Infusion Resources, Inc., and Diabetes Resources, Inc., d/b/a Insulin Infusion Specialties (collectively "IIS"), under the Robinson-Patman Act, 15 U.S.C. § 13(a), and the Louisiana Price Discrimination Act, La. R.S. § 51:331.1 After reviewing the arguments of counsel, the record, and the applicable law, IT IS ORDERED that IIS' Motion for Partial Summary Judgment is hereby DENIED and MiniMed's Motion

for Partial Summary Judgment is hereby GRANTED as to the above-mentioned claims.[10]

BACKGROUND

On November 24, 1998, Plaintiffs, Infusion Resources, Inc., and Diabetes Resources, Inc., d/b/a Insulin Infusion Specialties (collectively "IIS"). filed a Petition for Declaratory Judgment and Damages ("Petition") against MiniMed in Civil District Court for the Parish of Orleans, State of Louisiana. *See* Rec. Doc. 1 at Ex. D. According to the Petition, IIS is a full-service diabetes management company, distributing diabetic supplies and providing patient education, support, and training. *See* ¶ 4. The Petition alleges that MiniMed[11] manufactures and distributes diabetic pumps, infusion sets, and other supplies. *See* ¶ 6. The Petition further alleges that the parties entered into an agreement whereby IIS was granted a non-exclusive right to sell and distribute MiniMed products. *See* ¶ 7. IIS maintains that on April 21, 1998, MiniMed wrote to IIS, claimed the latter was in default under the agreement because IIS had been actively promoting

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[10]The Court does not address here the portion of the Motion for Summary Judgment of Defendant, MiniMed, Inc. ("MiniMed"), on IIS' claims under the Sherman Act, 15 U.S.C. §§1 and 2, and La. R.S. §§ 51:122 and 51:123.

[11]MiniMed contends that it was purchased by Medtronic, Inc., in 2001, and is now known as Medtronic MiniMed, a wholly owned subsidiary of Medtronic. *See* Rec. Doc. 107, Mem. In Supp. of MiniMed's Mot. for Partial Summ. J. at 3. On April 15, 2002, the Court entered an Order granting IIS' Motion for Addition of Corporate Defendant after Merger, thereby adding Medtronic MiniMed, Inc., as the named Defendant. *See* Rec. Doc. 131.

non-Mini-Med products. *See* Petition at ¶ 7. IIS also claims that MiniMed breached the agreement, including wrongfully passing on IIS confidential and proprietary patient information to MiniMed salespeople. *See id.* at ¶¶ 15, 16. IIS also charges MiniMed with making intentional and material misrepresentations to IIS customers to divert sales from IIS to MiniMed. *See id.* at ¶ 17. Finally, IIS complains. MiniMed has acquired IIS's two main distribution competitors and has unfairly manipulated the wholesale prices at which it sells MiniMed products to IIS to hinder IIS's ability to compete with MiniMed or MiniMed-owned distributors. *See id.* at ¶ 18. The Petition seeks damages pursuant to MiniMed's alleged unfair trade practices and breach of contract and a declaratory judgment that IIS has not breached the agreement and that the agreement remained in effect through December 31, 1998. *See* ¶¶ 20-26.

On January 20, 1999, IIS filed a First Amended Petition charging MiniMed additionally with knowingly or recklessly making damaging false statements to third parties about IIS's business practices and the relationship of IIS and its products to MiniMed and its products. *See* ¶¶ 15, 16. Moreover, IIS claims, MiniMed broke its promise to support IIS's efforts to "increase sales and grow business." ¶ 38. In addition to the causes of action in the Petition, the First Amended Petition seeks damages pursuant to MiniMed's alleged trade secrets violations, defamation, and detrimental reliance. *See* ¶¶ 27-41. Specifically, IIS asserts claims pursuant to, *inter alia,* the Robinson-Patman Act, 15 U.S.C. § 13(a), and La. R.S. § 51:331.

On March 8, 1999, MiniMed timely removed the case. *See* Rec. Doc. 1.

IIS bases its claims under the Robinson-Patman Act and the Louisiana Price Discrimination Act on the following: prior to January 1, 1999, IIS was one of the three largest distributors of MiniMed products. See Rec. Doc. 98, Ex. B at Sayer-1. IIS' contractual distribution territory included Louisiana, Texas, Arkansas, Ohio, Pennsylvania, New York, Connecticut, New Jersey, Utah, Virginia, North Carolina, and Mississippi. *See* Rec. Doc. 108, MiniMed Inc.'s Resp. to Pl.'s Statement of Material Facts in Supp. of Its Mot. for Partial Summ. J. with Respect to Pl.'s Price Discrimination Claims at ¶19. Additionally, IIS had contracts with third-party payors that could require sales activities outside this territory. *See id.* at ¶ 20. Until December 31, 1998, IIS had been receiving a 29 percent discount off list prices on MiniMed pumps. *See Id.* at ¶ 16.

On December 31, 1998, the distribution agreement terminated. *See id.* at ¶ 12. Thereafter, MiniMed stated that it was willing to provide its pumps at list prices to IIS for resale. According to a MiniMed invoice, on January 29, 1999, IIS purchased from MiniMed a 507C insulin pump for $4,995. *See* Rec. Doc. 98, Ex. B at Sayer-7. The pump was shipped from California to Louisiana. *See id.* There is also evidence that between January 1, 1999, and February 4, 1999, MiniMed sold other distributors the same type of pump, across state lines, for $3,996. *See id.* at Sayer-6. One of these distributors was an entity identified on the invoice as Secure Care Medical. *See Id.*, Sayer-6 at 27. An

entity identified as Secure Care and which the Court assumes for the purposes of this Order is the same as Secure Care Medical, was named as a MiniMed distributor "in the south." *See Id.* at 203.

A. STANDARD OF REVIEW

A district court can grant a motion for summary judgment only when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed.2d 265 (1986) (quoting Fed. R. Civ. P. 56(c)). When considering a motion for summary judgment, the district court "will review the facts drawing all inferences most favorable to the party opposing the motion." *Reid v. State Farm Mut. Auto. Ins. Co.,* 784 F.2d 577,578 (5th Cir. 1986). The court must find "[a] factual dispute. . . [to be] 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. . . [and a] fact. .. [to be] 'material' if it might affect the outcome of the suit under the governing substantive law." *Beck v. Somerset Techs., Inc.,* 882 F.2d 993, 996 (5th Cir. 1989) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed.2d 202 (1986)).

Where, as is the case with IIS here, the movants bear the burden of proof on an issue, "[they] must establish beyond peradventure all of the essential elements of the claim.. . to warrant judgment in

[their] favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). "if the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995) (citing *Celotex*, 477 U.S. at 322-24, 106 S. Ct. at 2552-53, 91 L. Ed.2d 265 and Fed. R. Civ. P. 56(e)). The mere argued existence of a factual dispute will not defeat an otherwise properly supported motion. *See Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510, 91 L. Ed.2d 202. "If the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at *249-50*, 106 S. Ct. at 2511, 91 L. Ed.2d 202 (citations omitted).

ANALYSIS

Robinson-Patman Act

Section 2(a) of the Clayton Act, as amended in 1936 by the Robinson-Patman Act, provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold

> for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

15 U.S.C. § 13(a).

Injury under § 13(a) is one of two basic types: "primary line or secondary line." *Eximco, Inc. v. Trane Co.*, 737 F.2d 505, 515 (5tht Cir.), *reh'g granted in part, amended in part on other grounds*, 748 F.2d 287 (5th Cir. 1984). The Fifth Circuit explains that "primarily-line injury, which occurs at the level of direct competition, customarily results when a seller uses predatory pricing policies to enhance his market position over competitors." *Id.* Secondary-line injury results from price discrimination between favored and disfavored buyers. *See Texaco, Inc.* v. *Hasbrouck*, 496 U.S. 543, 558 n.15, 110 S. Ct. 2535, 2543 n.15, 110 L. Ed.2d 492 (1990).[12] IIS claims secondary-line injury here.

Accordingly, establishing a violation of § 13(a) requires IIS to prove four facts: (1) sales made in interstate commerce; (2) the commodities sold to IIS

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[12] In *Hasbrouck*, the Supreme Court also identified a third category, tertiary-line injury, which is "the probable impact of the [price] discrimination" on the customers of either the "competitors of the seller" or "the favored and disfavored buyers" *Id.*

were of the same grade and quality as those sold to other purchasers; (3) that MiniMed discriminated in price between IIS and other purchasers; and (4) that the discrimination had a prohibited effect on competition. *See Lycon Inc. v. Juenke,* 250 F.3d 285, 288 (5th Cir.), *cert. denied,* 122 S. Ct. 209, 151 L. Ed.2d 149 (2001).

(1) Were requisite sales made in interstate commerce?

To advance a Robinson-Patman Act claim under this prong of the inquiry, "there must be actual sales at two different prices to two different Buyers." *M. C. Mfg.Co.* v. *Texas Foundries, Inc.,* 517 F.2d 1059, 1065 (5th Cir. 1975). IIS has set forth unrebutted evidence that it ordered a pump from MiniMed for $4,995, on January 29, 1999, and that the latter shipped this pump from California to the former in Louisiana. *See* Rec. Doc. 98, Ex. B at Sayer-7. Moreover, IIS has submitted unrebutted evidence that MiniMed sold pumps to a number of other distributors outside California for $3,996 in January and February 1999. *See Id.* at Sayer-6.

MiniMed nevertheless asserts that no actual sale was made by MiniMed to IIS because IIS did not pay for the pump and that the sale thus was not made, thereby precluding IIS from prevailing on its claim. The Court disagrees.

Under the laws of either California, from where the pump was shipped, or Louisiana, to where the pump was shipped, a sale of the pump was made. In California, "[a] sale consists in the passing of title from the seller to the buyer for a price. . . . "Cal.

Com. Code § 2106. "Title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods." Cal. Comm Code § 2401. In Louisiana, "[o]wnership is transferred between the parties as soon as there is agreement on the thing and the price is fixed, even though the thing sold is not yet delivered nor the price paid." La. Civil Code art. 2456. Thus, a sale was made for purposes of the analysis here.

MiniMed contends, additionally, that the sale was a sham designed to fashion a RobinsonPatman Act claim and thus cannot be considered a qualifying sale under the first prong of the inquiry here. MiniMed states, without pointing to authority in support, that the transaction here does not qualify as a statutory sale because the Robinson-Patman Act is designed to deal with harms occasioned by "real commerce" and to address "real competitive injury." The Court again disagrees. MiniMed does not explain how this sale, which created legally enforceable rights and obligations, was not "real." Additionally, MiniMed's focus on the lack of competitive injury is more properly directed to the fourth prong of the analysis, whether the price discrimination had a prohibited effect on competition.

Accordingly, because IIS has established that sales were made at two different prices to two different purchasers, it has satisfied its summary judgment burden on the first element of its claim.

(2) Were the commodities sold to IIS of the same grade and quality as those sold to other purchasers?

IIS has submitted evidence, which MiniMed does not rebut, that MiniMed sold to IIS the same model pump as it did to MiniMed's competitors. Thus, IIS has satisfied its surnmary judgment burden under the second prong of the inquiry here.

(3) Did MiniMed discriminate in price between IIS and other purchasers?

Under this prong of the analysis in a secondary-line case, "plaintiff must first prove that, as the disfavored purchaser, it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential." *Best Brands Beverage, Inc.* v. *Falstaff Brewing Co.*, 842 F.2d 578, 584 (2d Cir. 1987). "The competitive nexus requirement is satisfied when there is a showing of 'competitive contact' between the recipients of the price differential. It must therefore be shown that, as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market." *Id.* at 585 (quoting F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 173-180 (1962)). As the Fifth Circuit has explained, "Competition is determined by careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing." *M.C. Mfg.*, 517 F.2d at 1068 n.20 (quoting *Ag-Chem Equip. Co. v. Hahn, Inc.*, 350 F. Supp. 1044, 1051 (D. Minn. 1972),

modified on other grounds, 480 F.2d 482 (8th Cir. 1973)).

MiniMed contends that IIS' proof fails in this regard. The Court agrees. IIS shows that MiniMed sold numerous other retailers the same pump for $3,996 that MiniMed sold to IIS for $4,995. *See* Rec. Doc. 98, Ex. B at Sayer-7; *id.* at Sayer-6. IIS claims that it was the nationwide competitor of these entities and submits as evidence thereof a memo to the effect that before the alleged price discrimination occurred, it was one of MiniMed's top three distributors. *See* Rec. Doc. 98, Ex. B at Sayer-1. Even assuming, *arguendo,* that IIS was one of MiniMed's top three distributors, the conclusion that the markets of these distributors overlapped does not necessarily follow. IIS does not specifically indicate any evidence showing that the company directly competed with any of these companies for "the same dollar" nationwide. *See M.C. Mfg.,* 517 F.2d at 1068 n.20.

IIS has submitted evidence that prior to the alleged price discrimination, it competed with at least one other reseller, Secure Care, in the South, to which similar pumps were sold during the period of the alleged injury. *See* Rec. Doc. 98, Ex. B at 203; *id.,* Sayer-6 at 27. Additionally, IIS has submitted evidence that an entity named National Diabetes Pharmacy distributed MiniMed products in Virginia. *See id,* Ex. B at 203. A MiniMed official also identified as a distributor of MiniMed products an entity named JQ Medical. *See id.*

IIS baldly asserts, "All of these distributors were within the United States and even fell within the

pre-1999 territory of IIS set out in the MiniMed-IIS Educational Dealer Agreement! How can MiniMed even suggest to the Court with a straight face that IIS did not compete with the favored purchaser-distributors who resold MiniMed products in IIS' territory?" Yet, although IIS has submitted proof that under the contract IIS distributed MiniMed products in Southern states (*e.g.*, Louisiana), IIS simply has specifically pointed to no evidence that at the time of the alleged price discrimination, it was competing with Secure Care or any other entity in a particular market.[13] Its claim thus fails, and summary judgment on the Robinson-Patman Act claim accordingly must be awarded to MiniMed.[14]

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[13] The Court notes that:

> unsubstantiated assertions are not competent summary judgment evidence. The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim. Rule *56* does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment.

Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998) (internal citations and quotations omitted).

[14] Given the Court's basis for determining that IIS has failed to carry its burden against MiniMed's summary judgment motion under the third prong of the analysis, the Court need not address MiniMed's alternative argument for dismissal on this prong; the cross-motions as to the final prong of the § 2(a) inquiry, whether the discrimination had a prohibited effect on competition; or the cross-motions as to whether IIS suffered actual injury under § 2(a) for the purpose of establishing IIS' entitlement to treble damages pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15.

La. R.S. § 51:331

The Louisiana Price Discrimination Statute provides:

> No person, doing business in Louisiana, and engaged in the production, manufacture, or distribution of any commodity in general use, who shall, intentionally, for the purpose of injuring or destroying the business of a competitor in any locality, discriminate between different sections, communities, cities, or localities in the state by selling such commodity at a lower rate in one section, community, city, or locality, than is charged for the commodity by such person in another section, community, city, or locality, after making due allowance for the difference if any, in the grade or quality of the commodity and in the actual cost of transportation of the commodity from the point of production, if a raw product, or from the point of manufacture, if a manufactured product. All sales so made shall be prima facie evidence of unfair discrimination.

La. R.S. § 51:331.

The parties essentially contend that IIS' price discrimination claim must be analyzed the same under the Louisiana statute as it is under § 2(a) of the Robinson-Patman Act. *See .Jefferson v. Chevron*

USA., Inc., 98-0254 (La. App. 4 Cir., 5/26/98), 713 So. 2d 785,792 n. 1 (Louisiana statute is "closely analogous" to Robinson-Patman Act). The plain language of the statute, however, makes it clear that the Louisiana legislature intended to address discriminatory pricing "in the state." La. R.S. § 51:331. Nevertheless, IIS sets forth no specific evidence that MiniMed charged IIS a different price than it charged any other pump purchaser in Louisiana. Accordingly, MiniMed's motion for summary judgment on IIS' claim under La. R.S. § 51:331 is granted.

1. CONCLUSION

For the foregoing reasons,

IT IS ORDERED that:

(1) IIS' Motion for Partial Summary Judgment is hereby DENIED, and

(2) MiniMed's Motion for Summary Judgment is hereby GRANTED as to IIS' claims under 15 U.S.C. § 13(a) and La. R.S. § 51:33 1.

New Orleans, Louisiana, this 2nd day of May, 2002.

/s/ signature illegible
For Helen G.Berrigan
Chief Judge